NO. 46315-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

AFFORDABLE STORAGE CONTAINERS, INC.,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Affordable Storage Containers, Inc. appeals from the Employment Security Department Commissioner's Decision which imposed an unemployment benefits tax assessment on corporate officer wages for the years 2010 and 2011. The Administrative Law Judge (ALJ) who presided over the hearing concluded in her initial order that a 2007 amendment to the Employment Security Act required any corporation claiming officer exemptions to notify the Department through the proper forms. The ALJ found Affordable could not produce sufficient evidence that these requirements had been met and so could not claim the exemption.

The Commissioner adopted the ALJ's findings of fact and conclusions of law, adding Affordable had the burden to maintain proper documentation and could "provide no evidence" that the required forms had been received or approved by the Department.[1] Further, while Affordable sought relief in equity from the charges in the assessment, the Commissioner exercised discretion and affirmed the ALJ's decision declining to waive the taxes, penalties, and interest due. As a result, the Department asks this Court to affirm the Commissioner's Decision.

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[1] Because the Commissioner adopted all of the ALJ's findings of fact and conclusions of law, for the remainder of this brief, they will be referred to as the Commissioner's findings and conclusions.

II. COUNTERSTATEMENT OF THE ISSUES

1. Should the Commissioner's findings of fact – in particular that there was no reliable evidence the Department received or approved the corporate officer tax exemptions requested by Affordable – be treated as verities on appeal where the findings were not assigned error by Affordable, and are supported by substantial evidence in the record?

2. Did the Commissioner properly interpret and apply the Employment Security Act when he concluded the 2007 amendment to RCW 50.04.165 required affirmative notice via the proper form in order for a corporation to claim officer exemptions, and that Affordable did not meet these requirements for tax years 2010 and 2011?

3. May the Court compromise the tax assessment or force the Commissioner to do so on remand where the statute grants the Commissioner discretion to determine whether a compromise of the assessment is appropriate?

4. Are attorney fees and costs appropriate where, as here, Affordable should not prevail and the agency action was substantially justified by both facts and law?

III. STATEMENT OF THE CASE

Affordable Storage Containers, Inc., incorporated in 2001. Administrative Record (AR) at 78. At that time, the Employment Security

Act set the default as exclusion of corporate officers from unemployment benefits. Former RCW 50.04.165 (effective until January 1, 2009); AR at 71, Conclusions of Law (CL) 1. Although Affordable did not raise the issue during the hearing, it now contends that it wished to claim this exemption for its two corporate officers at its initial registration and indicated this by leaving the opt-in box blank on its Master Business Plan filed with the Department in 2001. Brief of Appellant (Br. App.) at 3. This action would have been sufficient to meet the tax exemption requirements of the Act at that time. AR at 71, CL 1.

However, in 2007, the Legislature amended the Employment Security Act provision with respect to corporate officer coverage. Laws of 2007, ch. 146 § 4 (effective January 1, 2009) (attached as Appendix A) (amending Former RCW 50.04.165). Effective for tax years 2010, 2011, and 2012, this reset the default to include corporate officers in unemployment taxes and benefits coverage; and prescribed methods for opting out of such coverage. Former RCW 50.04.165. Employers who did not want benefits coverage for a corporate officer were required to affirmatively opt out of coverage on a form designated by the Department. AR at 69, Finding of Fact (FF) 2.

After the amendment, Affordable's accountant was notified of the new paperwork requirements. AR at 69, Finding of Fact (FF) 1; AR at 25

(testimony of Affordable's accountant). As a result, he prepared the two forms required to claim exemptions for the two corporate officers and sent them to Affordable's two corporate officers for review, signature, and mailing to the Department. AR at 26-27; AR at 69, FF 2. The Department has no record showing receipt of these forms from Affordable for tax years 2010 or 2011. AR at 21 (auditor's testimony); AR at 72, CL 7.

In contrast, the Department auditor pointed out that Affordable had properly filed for corporate officer exemptions in 2012. AR at 20. These 2012 requests had been approved and were on file with the Department. AR at 21-23.

At the administrative hearing, one corporate officer testified that he recalled receiving, signing and mailing at least one of the two required forms for tax years 2010-2011.[2] AR at 33-34; AR at 70, FF 6. However, he admitted he could produce no copy of the forms, no mailing receipt, and no approval letter from the Department. AR at 33-34; AR at 70, FF 6, 7; AR at 72, CL 6.

Affordable produced other records at the hearing to show it indicated tax exemption for its officers by other means, such as through quarterly tax forms submitted thereafter. Br. App. at 4-5; AR at 44 (Affordable closing argument); AR at 90-96 (Exs. A and B, Affordable's

[2] As the ALJ noted, a form was required for each corporate officer. AR at 72, CL 6, 7.

quarterly tax forms). Although it did not raise the issue of its Master Business Plan at the initial hearing, Affordable now claims that its Master Business Plan submitted in 2001 – years before the statutory amendment – also indicated its intent to claim the exemptions. Br. App. at 3 (citing Clerk's Papers (CP) at 115-143 [Petitioner's Trial Brief, filed December 02, 2013)]. However, the ALJ concluded the terms of the statute were clear: affirmative notice through the proper form was required, and in this case, the requirement was not met. AR at 71-72, CL 3-5, 9 (citing Former RCW 50.04.165(2); WAC 192-310-160(2)). The Commissioner agreed and adopted all findings of fact and conclusions of law of the ALJ, with additional comments. AR at 85-86. The Commissioner concluded Affordable had not met its burden to claim tax exemptions for 2010 or 2011. AR at 85-86; AR at 72, CL 8 (ALJ CL 8 adopted by the Commissioner).

The Superior Court for Pierce County agreed, affirmed the Commissioner's order, and denied Affordable's motion for reconsideration. CP at 170-72 (Findings of Fact, Conclusions of Law and Order); CP at 192-93 (Order Granting [sic] Petitioner's Motion for Reconsideration (denying motion)). Affordable now appeals, claiming the Commissioner's interpretation and application of the law is in error. Br. App. at 1.

IV. STANDARD OF REVIEW

Affordable seeks judicial review of the administrative decision of the Commissioner of the Employment Security Department. Judicial review of the Commissioner's decision is governed by the Washington Administrative Procedure Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. The Court of Appeals sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). The Court reviews the decision of the Commissioner, not the underlying decision of the ALJ—except to the extent the Commissioner's decision adopted any findings and conclusions of the ALJ's order. *Id.* Here, the Commissioner adopted the ALJ's findings and conclusions, with additional comments. AR at 85-86.

The Court's review is limited to the agency record. RCW 34.05.558. The Commissioner's decision is considered *prima facie* correct, and the burden of demonstrating its invalidity is on the Appellant. RCW 50.32.150; RCW 34.05.570(1)(a).

A. Factual Findings

An agency's findings of fact must be upheld if supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

"Substantial evidence is evidence of a 'sufficient quantity ... to persuade a fair-minded person of the truth and correctness'" of the finding. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014) (quoting *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 588, 90 P.3d 659 (2004)). Under this standard, evidence may be sufficient to support a factual finding even if the evidence is conflicting or could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

The reviewing court should "view the evidence and any reasonable inferences in the light most favorable to the party that prevailed . . . ." at the administrative proceeding. *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004). The reviewing court cannot substitute its judgment on the credibility of the witnesses or the weight given to conflicting evidence. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Unchallenged findings are verities on appeal. *Tapper v.State of Wash., Emp't. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

B. Conclusions of Law

Questions of law are reviewed *de novo*. *Affordable Cabs*, 124 Wn. App. at 367. However, where, as here, an agency has expertise in a particular area, the court should accord substantial weight to the agency's

decision. *Macey v. Dep't of Emp't. Sec.*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988); *In re All-State Const. Co. v. Gordon*, 70 Wn.2d 657, 665, 425 P.2d 16 (1967). The court in *All-State Const.* also noted that the Commissioner's Decision applying the unemployment fund tax "shall be prima facie correct, and the burden of proof shall be upon the party attacking the same." *Id.* at 665.

C. Mixed Questions of Law and Fact

When there is a mixed question of law and fact, the court must make a three-step analysis. *Tapper*, 122 Wn.2d at 403. First, the court determines which factual findings below are supported by substantial evidence. *Id.* Second, the court makes a *de novo* determination of the correct law, and third, it applies the law to the facts. *Id.* As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law. *Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

V. ARGUMENT

The Court should affirm the Commissioner's Decision because the factual findings are not challenged and are supported by substantial evidence, and his conclusions of law are not in error.

A. The Factual Findings Are Not Challenged, Should Be Treated as Verities on Appeal, and Are Supported by Substantial Evidence

Although Affordable cites to RCW 34.05.570(3)(a)-(d), including the section entitling a petitioner to relief from findings of fact not supported by substantial evidence, Affordable does not clearly assign error to any of the findings of fact. Br. App. at 1. Rather, all of Affordable's assigned errors should be characterized as challenges to legal conclusions and the application of the law under RCW 34.05.570(3)(b). Therefore, the findings of fact are unchallenged and should be treated as verities on appeal. *Tapper*, 122 Wn.2d at 407.

To the extent Affordable attempts to challenge any findings, these findings are supported by substantial evidence. Affordable only tangentially challenges one finding of fact by referencing the testimony of its corporate officer. Br. App. at 1. The ALJ found, "There is no reliable evidence that this corporation did actually file any corporate officer exemption request timely for 2010 or 2011." AR at 71, CL 5.[3] The corporate officer stated that he received the completed exemption request forms from his accountant and believed he mailed one or possibly two of the required forms to the Department. AR at 33-34; AR at 70, FF 6; AR at

[3] Despite being labeled under the heading "Conclusions of Law," this statement is a finding of fact. The Court may view it as such. *See Tapper*, 122 Wn.2d at 406.

71, CL 6.[4] However, because the Department had no record of the forms, and Affordable's corporate officer had not kept a copy of the forms, had no proof of mailing, and had no approval letter from the Department, the ALJ found Affordable could not claim the exemptions. AR at 21-22 (Department records); AR at 33-34 (Affordable's corporate officer testimony; AR at 71, CL 5. Affordable's lack of documentation was conceded by its officer during the hearing. AR at 32 (recalled signing and mailing, but had no copy of the mailed form or forms, no mailing receipt, and no approval letter). Affordable bore the burden of maintaining proper documentation but could "provide no evidence that the exemptions were received and approved by the Department." AR at 85 (Commissioner's Decision); AR at 71 (CL 5).

Because Affordable has not assigned error to this or any other specific findings of fact, the findings should be treated as verities on appeal. Br. App. at 4; *Tapper*, 122 Wn.2d at 407. However, even if properly challenged, the findings of fact are supported by substantial evidence in the record, including the corporate officer's lack of documentation.

[4] Again, despite being labeled under the heading "Conclusions of Law," this statement is a finding of fact. *See Tapper*, 122 Wn.2d at 406.

B. The Commissioner's Interpretation and Application of Law Were Not in Error

1. The statutory intent of the Employment Security Act requires narrow construction of tax exemptions.

Case law interpreting the purpose of the Employment Security Act holds that tax exemptions – such as those claimed by Affordable – must be construed narrowly.

As Affordable points out, in general the statute must be liberally construed. Br. App. at 9-10. However, this liberal construction must be "in favor of the unemployed worker." *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450-51, 41 P.3d 510 (2002). The Washington State Supreme Court has stated, it is an "established principle that an exemption from a taxation statute must be strictly construed in favor of the application of the tax and against the exemption, and that the burden of proof is on the person seeking the exemption." *Fors Farms, Inc. v. Emp't Sec. Dep't*, 75 Wn.2d 383, 387, 450 P.2d 973 (1969) (internal citations omitted). This strict construction in favor of tax application does not favor Affordable, an employer seeking to exclude individuals from coverage, and it does not support Affordable's "substantial compliance" argument. Br. App. at 9-10, 16-17.

2. The Commissioner did not err in concluding former RCW 50.04.165 required affirmative notice of corporate officer exemption requests via the proper form.

a. The clear and unambiguous language of former RCW 50.04.165 supports the Commissioner's legal conclusions.

The purpose of statutory interpretation is to "give effect to the Legislature's intent." *Stone v. Chelan Cnty. Sheriff's Dep't*, 110 Wn.2d 806, 809-810, 756 P.2d 736 (1988) (citing *State v. Standifer*, 110 Wn.2d 90, 92, 750 P.2d 258 (1988); *State v. Wilbur*, 110 Wn.2d 16, 18, 749 P.2d 1295 (1988)). If the language of the statute "is clear and unambiguous," there is no need to proceed to canons of statutory construction. *Stone*, 110 Wn.2d at 810 (citing *Wilbur*, 110 Wn.2d at 92). The plain language of the statute at issue here is clear, and so there is no need to proceed further to discern the Legislature's intent.

In 2007, the Legislature significantly amended RCW 50.04.165, which governs coverage of corporate officers for unemployment benefit and tax purposes. Laws of 2007, ch. 146, § 4. Formerly, the default was that services performed by corporate officers were *not* considered services in employment for purposes of the Employment Security Act. Former RCW 50.04.165(1)(a) (1993). This meant that by default, corporate officer wages were exempt from taxation and corporate officers could not apply for benefits, but employers could opt in and elect coverage. Id.

Under the 2007 amendment, services performed by corporate officers "*are* considered services in employment." Former RCW 50.04.165(1)(a) (2007); Laws of 2007, ch. 146, § 4 (emphasis added).[5] This reversed the default to inclusion of corporate officer wages and benefits, but corporations were permitted to exempt them from coverage by following the methods provided in section 2 of the statute.

Section 2 of former RCW 50.04.165 provided particular requirements for claiming exemption of corporate officers:

> The corporation *must notify the department* when it elects to exempt one or more corporate officers from coverage. The notice *must be in a format prescribed by the department* and signed by the officer or officers being exempted and by another corporate officer verifying the decision to be exempt from coverage.

Former RCW 50.04.165(2)(a) (2007), Laws of 2007, ch. 146, § 4 (effective January 1, 2009) (emphasis added).

For tax years 2010 and 2011, the period at issue in the assessment on appeal here, the plain language of RCW 50.40.165 required two things: (1) affirmative notice (2) via the proper form. First, a corporation "must notify the department" in order to claim corporate officer exemptions.

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[5] The Legislature again amended RCW 50.04.165 in 2013. Laws of 2013, ch. 250 § 2. However, the tax years at issue here are 2010 and 2011. The Department has documentation on file showing Affordable properly claimed, and was granted, corporate officer exemptions for the tax year 2012 prior to the audit which triggered this case. AR at 21-23.

Former RCW 50.04.165(2)(a) (2007), Laws of 2007, ch. 146, § 4. This amendment created the requirement that corporations affirmatively notify the Department of its election to opt-out of corporate officer coverage. The statutory language was in present tense, which supports the Department's interpretation that previous default notifications of corporate officer exclusion – such as Affordable's 2001 Master Business Plan (permitted in the past) – were insufficient under the amended law. *See State v. McClendon,* 131 Wn.2d 853, 861, 935 P.2d 1334 (1997) (under plain language analysis, present tense wording illustrates statute's prospective operation).

Second, such notice must be "in a format prescribed by the department." Former RCW 50.04.165(2)(a) (2007), Laws of 2007, ch. 146, § 4. As Affordable conceded during the hearing, the Department designated a particular form as the appropriate format and Affordable was notified of these new paperwork requirements. AR at 25-26 (testimony of Affordable's accountant).

As noted above, Affordable was made aware of these new requirements in effect for the period here at issue and, in fact, attempted to comply with them by preparing the proper forms. AR at 71, CL 5 (a finding of fact in ALJ's Initial Order); AR at 85 (Commissioner's Decision); AR at 25-26 (testimony of Affordable's accountant). That

Affordable began the process of properly claiming exemption reveals Affordable was aware its other actions—i.e., not checking a box on Master Business Plan in 2001, and quarterly tax reports noting corporate officer exemptions—were insufficient to satisfy the statute.

In addition, neither the unchecked box on the 2001 Master Business Plan nor the quarterly tax reports meet the requirements of the statute. The fact that a box on the Master Business Plan from 2001 was *not* checked for opting into coverage for corporate officers is not affirmative notice of a decision to opt-out. Like the Master Business Plan, the quarterly tax reports were also insufficient because those reports are not the "format prescribed by the department" for electing exemption from corporate officer coverage. *See* Former RCW 50.04.165(2)(a), Laws of 2007 ch. 146 § 4. The statute refers to "[t]he notice," meaning the notice of exemption election, not forms prescribed by the Department for other purposes. *See id.* There is also no evidence that the quarterly tax reports were signed by the corporate officers, which is another requirement of the statute. AR at 90-96; Former RCW 50.04.165(2)(a) (2007), Laws of 2007, ch. 146, § 4.

The 2007 amendments to RCW 50.04.165 also addressed the timing of when corporations may claim exemptions for their officers. The amendment provided the election "may be made when the corporation

registers as required under RCW 50.12.070" or "at any time following registration; however, an exemption will be effective only as of the first day of a calendar year" and must be sent by January 15 following the end of the last calendar year of coverage. Former RCW 50.04.165(2)(b) (2007), Laws of 2007, ch. 146, § 4.

Affordable claims section (2)(b) supports its argument that the unchecked box on its 2001 Master Business Plan satisfied the requirements to claim the 2011 and 2012 exemptions. Br. App. at 10. This reasoning is unavailing. The timing provisions of section 2(b) did not alter the format requirements of section 2(a). *See id.* Because the Master Business Plan did not meet the requirements of 2(a), it was insufficient.

b. Giving effect to all language in former RCW 50.04.165 supports the Commissioner's legal conclusions.

Furthermore, in order to give effect to legislative intent, a statute must be construed such that no portion is rendered "meaningless or superfluous." *Stone*, 110 Wn.2d at 810 (citing *Avlonitis v. Seattle Dist. Court*, 97 Wn.2d 131, 138, 641 P.2d 169 (1982)).

The Department's reading of former RCW 50.04.165, discussed above, gives effect to all portions of the statutory language. Affordable had initially been assigned corporate officer exemptions by default

because it had not checked a box on its Master Business Plan in 2001. Br. App. at 3 (citing CP at 115-143) (Petitioner's Trial Brief, Filed December 02, 2013)), Br. App. at 7. This did not meet the prescribed format or affirmative notice requirements under section (2)(a) of the 2007 statute. As a result, Affordable could not rely on its 2001 Master Business Plan to claim exemptions in 2010 or 2011. This interpretation gives effect to the plain language of section (2)(a).

In addition, the Department's interpretation that the proper opt-out forms were required to be submitted after the 2007 amendment gives effect to the plain language of section (2)(b) as well. A corporation initially registering in the year 2010 could take advantage of the option to fill out the proper form and submit it *at the time of its initial registration.* Former RCW 50.04.165(2)(b), Laws of 2007, ch. 146, § 4. This would enable such a corporation to claim the exemption for that tax year even if its registration date and submission of the form occurred after the January 15 deadline for that tax year. *Id.*

The Department's reading of the statute also makes sense from a policy perspective. Reading the statute to require submission of the new forms in all circumstances for all corporations would enable the Department to have the same form on file for all corporations and would

enable the Department to clearly understand corporate employers' intentions concerning whether officer coverage was sought.

In contrast, Affordable's "substantial compliance" reading fails to give effect to all text within the statute. Affordable reads the statute to mean that "constructive notice" through quarterly tax forms and unchecked boxes on the Master Business Plan filed years prior to the amendment should be sufficient. Br. App. at 9-12. However, this reading fails to give effect to the statute's language, which plainly requires affirmative notice "in a format prescribed by the department." Former RCW 50.04.165(2)(a), Laws of 2007, ch. 146, § 4. Affordable's argument would also require the Department to scour all correspondence received in an attempt to ascertain a corporation's intent with respect to corporate officer coverage, an untenable and unworkable proposition.

Affordable's citation to *Myles* in support of its substantial compliance or constructive notice argument is unpersuasive. Br. App. at 9 (citing *Myles v. Clark Cnty.*, 170 Wn. App. 521, 532-33, 289 P.3d 650 (2012)). In *Myles*, a different statute was analyzed, and that statute explicitly provided that "substantial compliance" with the statutory requirements was sufficient. *Myles*, 170 Wn. App. at 524 (quoting 2009 amendments to RCW 4.96.020)). Here, the language "substantial

compliance" does not appear in the relevant statute. Former RCW 50.04.165, Laws of 2007, ch. 146, § 4.

Affordable's argument that the Department's position elevates form over substance is an invitation for the Court to ignore the plain statutory language.[6] Br. App. at 11, 18. This is inappropriate. As the Commissioner correctly concluded, Affordable ultimately did not meet its burden to demonstrate that it had timely complied with former RCW 50.04.165(2) in effect for tax years 2010 and 2011.

3. The Legislature's amendment to the tax code did not violate any vested right.

Affordable essentially argues that once it met the 2001 requirements to claim the corporate officer tax exemption, it obtained "vested rights" in claiming those tax exemptions in all future years. Br. App. at 9, 14. This is incorrect.

It is an established principle of law that a state of affairs does not become a vested right every time a tax law is written and relied upon; and a party does not have a claim to violation of a vested right every time the legislature alters the tax code. *People ex rel. Clyde v. Gilchrist*, 262 U.S.

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[6] Affordable also argues the Department is "estopped" from claiming it lacked notice of Affordable's intent to exempt its corporate officer from coverage. Br. App. at 12. This argument is without citation to authority and should not be considered. In addition, former RCW 50.04.165 plainly required notice of opt-out on forms prescribed by the Department, and in this case, Affordable failed to meet its burden to show such forms were received and approved by the Department.

94, 43 S. Ct. 501, 67 L. Ed. 883 (1923) (holding New York Legislature's imposition of new income tax did not violate a vested right to a tax exemption, despite earlier statute exempting mortgages from all tax statutes except recording tax). In *Clyde*, the United States Supreme Court, per Justice Holmes, reasoned, "it is difficult to believe that the Legislature meant to barter away all its powers to meet future exigencies . . . ." *Clyde*, 262 U.S. at 98. If the current (or past) tax code created a vested right in future exemptions not yet due, the Legislature would not retain the power to reform the tax code.

Washington case law is consistent with this reasoning. In *Matter of Estate of Hitchman*, the State argued it had a "vested right" in taxes and that this right was violated when the Legislature altered the estate tax law. *Matter of Estate of Hitchman,* 100 Wn.2d 464, 670 P.2d 655 (1983). The Washington State Supreme Court disagreed, holding that the State did not have a vested right to collect taxes which had accrued upon a decedent's death but had not yet become due. "'[I]t is undoubtedly the rule that the state, through its legislature, may abolish or legislate out of existence a tax lien of any kind.'" *Hitchman*, 100 Wn.2d at 472 (quoting *North Spokane Irrig. Dist. 8 v. Spokane Cnty.*, 173 Wn. 281, 283, 22 P.2d 990 (1933)).

The corollary of the above holdings should also be true: an interest in a tax exemption becomes vested only after two events occur—first, the taxes must become due, and second, at the time taxes are due, the claimant must meet all the legal requirements in place *at the time the taxes are due. C.f. Hitchman*, 100 Wn.2d at 472; *c.f. Clyde*, 262 U.S. at 98. In the present case, Affordable's tax exemption under the 2001 version of the statute may have initially "accrued" once it met the 2001 requirements to claim the exemptions. *Hitchman*, 100 Wn.2d at 472. However, the future taxes for the years 2010 and 2011 "had not yet become due." *Id.* As a result, the Legislature was still free to change the requirements for claiming future exemptions, and it did so. Thus, Affordable's interest in the 2010 and 2011 tax exemptions, much like the State's interest in Hitchman's estate tax, had not become a vested right. Affordable had no vested rights preventing operation of the 2007 amendments to RCW 50.04.165.

4. Retroactive application of later amendments to RCW 50.04.165 is not appropriate.

The Department is not seeking retroactive application of any version of RCW 50.04.165. The Department seeks only to apply the law in effect at the time (2010-2011) to the actions Affordable took at that same time (2010-2011). In contrast, Affordable seeks retroactive

application of current RCW 50.04.165, as amended in 2013. Br. App. at 16. This amendment became effective December 29, 2013, which postdates the periods at issue in the tax assessment on appeal. Laws of 2013, ch. 250, § 2. The current version of the statute provides, "Services performed by a person appointed as an officer of a corporation . . . shall not be considered services in employment." Current RCW 50.04.165. Under this new amendment, the previous default is reversed. *Id.* Corporations must now opt into coverage for their officers, rather than opting out by giving the Department actual notice of the elected exemption. *Id.*

Retroactive application of statutory amendments is disfavored. *Barstad v. Stewart Title Guar. Co. Inc.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002) (citing *In re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997)). A statutory amendment is presumed "prospective unless there is legislative intent to apply the statute retroactively or the amendment is clearly curative or remedial." *Myles*, 170 Wn. App. at 530, 289 P.3d 650 (2012) (citing *Johnson v. Cont'l W., Inc.*, 99 Wn.2d 555, 559, 663 P.2d 482 (1983)). The presumption against retroactive application of a statute "is an essential thread in the mantle of protection that the law affords the individual citizen." *State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 384 (1999).

Here, there is no legislative intent to apply the current version of the statute retroactively. Instead, the Legislature clearly specified its intent that the statute apply only prospectively by stating an effective date of December 29, 2013. Laws of 2013, ch. 250, § 2.

The 2013 amendment is also not "curative" or "remedial." The definition of "curative" is limited to a statute which "clarifies or technically corrects an ambiguous statute without changing prior case law constructions of the statute." *Barstad*, 145 Wn.2d at 537 (citing *In re Pers. Restraint of Matteson*, 142 Wn.2d 298, 308, 12 P.3d 585 (2000)); *see also Myles*, 170 Wn. App. at 530 (citing *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988)). An amendment is deemed "remedial" when it relates to practice, procedure, or remedies, and does not affect a substantive or vested right. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

Here, the 2013 amendment did not merely clarify or correct the statute or relate only to practice, procedure, or remedies.[7] Rather, it altered the statute for corporate officer coverage from opt-out to opt-in. RCW 50.04.165; Laws of 2013, ch. 250, § 2. This is a substantive change. *Id.* With respect to corporate officer exemptions, the statute removes old requirements and creates new ones. *Id.* For example, the

[7] Affordable does not appear to argue that the 2013 amendment is "remedial" and instead asserts it is "curative." *See* Br. App. at 15-16.

statute no longer requires notice in writing to the Department to claim an exemption, but instead requires corporations to provide notice to exempt corporate officers of their inability to claim benefits. *Id.* The 2013 amendment is not curative or remedial as defined by case law, and should apply prospectively only.

Mixed in with Affordable's retroactive application argument are repeated assertions, with no citation to authority, that RCW 50.04.165 in effect during tax years 2010 and 2011 was "in conflict with Federal Law" and was thus "preempted." Br. App. at 5, 13, 15. Federal preemption requires a federal statute containing express preemption language, congressional laws which occupy an entire field of law, or a conflict with a specific federal law. *Resident Action Council v. Seattle Housing Authority*, ___ Wn.2d ___, 327 P.3d 600, 611 (as amended on denial of reconsideration) (Jan. 10, 2014). Affordable has claimed none of these here; its argument is unsupported and should be dismissed.[8]

Federal law neither required nor prohibited the 2007 or 2013 amendments to RCW 50.04.165, as states may generally adopt different

[8] It is possible Affordable intended its argument as a reference to the Legislature's statutory note which states that if portions of the statute are found to deprive the state of eligibility for federal funds or federal unemployment tax credits, those portions of the statute found "in conflict with [these] federal *requirements*" would be inoperative. Laws of 2013, ch. 250 § 5 (*codified as* Note *in* RCW 50.04.165 (referencing notes following RCW 50.12.070)) (emphasis added). However, the Legislature's choice to seek or not seek federal funding or tax credits has nothing to do with federal preemption, which requires a *conflict* with federal *laws*, as discussed above.

coverage provisions than are present in federal unemployment compensation law. *See Mid Vermont Christian School v. Dep't of Emp't & Training*, 885 A.2d 1210, 1214 (Vt. 2005) ("The states remain free to expand their unemployment compensation coverage beyond the federal minimum standards.") (citing *St. Martin Evangelical Lutheran Church v. S. Dakota*, 451 U.S. 772, 775, n.3, 101 S. Ct. 2142, 68 L. Ed. 2d 612 (1981)).

Further, it is not clear how Affordable's unsupported assertion of federal preemption relates to its argument concerning alleged retroactivity of the 2013 amendment, particularly given the case law definitions of curative and remedial discussed above.

The current amendment is not curative or remedial, no legislative intent supports retroactivity, and Affordable's federal preemption claim is unsupported. Therefore, retroactive application of the current version of RCW 50.04.165 is inappropriate.

C. The Commissioner's Decision Not to Compromise the Assessment Was Not an Error of Law

Affordable argues both the ALJ and the Commissioner have authority to compromise tax assessments, and so the Commissioner's Order was an error of law. Br. App. at 21-23. RCW 50.24.020 provides, in relevant part:

> The *commissioner* may compromise any claim for contributions, interest, or penalties due and owing from an employer, and any amount owed by an individual because of benefit overpayments existing or arising under this title in any case where collection of the full amount due and owing, whether reduced to judgment or otherwise, would be against equity and good conscience.

RCW 50.24.020 (emphasis added).

Under this statute, the Commissioner does, but the ALJ does not, have discretion to compromise claims for contributions, interest or penalties. The ALJ, in responding to Affordable's general plea for equitable relief, was correct in pointing out *the ALJ* had no equitable powers to compromise the assessment. AR at 41-42; AR at 72, CL 8.

By adopting the findings of fact and conclusions of law of the ALJ, the Commissioner was not adopting the statement "As an ALJ . . .". The Commissioner knew he is not an ALJ – to hold otherwise strains the bounds of reason. The Commissioner was not claiming to be an ALJ or limiting himself to the ALJ's description of an ALJ's authority. Instead, by affirming the ALJ's initial order, the Commissioner was exercising his discretion not to compromise the assessment.

Moreover, the text of the statute states the Commissioner "may" compromise assessments; it does not require compromise. RCW 50.24.020. It would be inappropriate for the Court to force the Commissioner to select one of two options available to the Commissioner

in his discretion. *See Graves v. Emp't Sec. Dep't*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008) (abuse of discretion requires ESD decision to be "manifestly unreasonable or exercised on untenable grounds or for untenable reasons") (citing *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979)).[9]

1. The Court has authority, but not unlimited authority, to set aside agency action.

Appellant cites to RCW 34.05.574(1) as providing authority for the Court to reverse the Commissioner's Decision or even to "waiv[e] the charges" in the tax assessment. Br. App. at 21. However, the Court does not have unconstrained equitable authority to fashion remedies under RCW 34.05.574(1). This remedy portion of the statute provides:

> In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion *required* by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. The court shall set out in its findings and conclusions, as appropriate, each violation or error by the agency under the standards for review set out in this chapter on which the court bases its decision and order. *In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion*

[9] Affordable's assertion at Br. App. at 23-24 that no benefits were paid here is misplaced because it fails to consider the nature of tax and insurance principles. The purpose of the Employment Security Act is to accumulate funds for the protection of unemployed workers, and share risks across all employers, even those who do not have claims. *See* RCW 50.01.010.

> *that the legislature has placed in the agency.* The court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay.

RCW 34.05.574(1) (emphasis added).

This statute provides the remedies available once an error is found under RCW 34.05.570. It does not provide a separate cause of action, a separate standard of review, or a separate grant of authority under which a court can overturn agency action. To set aside agency action, a court must first find an error under RCW 34.05.570; if and only if such an error is found may the court apply one of the remedies available under RCW 34.05.574(1). As discussed above, the Commissioner's Decision is without factual or legal error, and so none of the RCW 30.05.570 remedies are appropriate except to affirm the decision of the Commissioner.

Even if this Court were first to find an error under RCW 34.05.570 and then to reach remedies under RCW 34.05.574(1), the remedy authority is limited. Under the remedy statute a court can "order an agency to exercise discretion *required* by law," RCW 34.05.574(1) (emphasis added). *Id.* However, when reviewing matters within the agency's discretion, the court is not permitted to substitute its own judgment for that of the agency. *Id.* ("the court shall limit its function to assuring that the agency has exercised its discretion in accordance with

law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency").

The Legislature granted the Commissioner the authority to compromise tax assessments or not as he saw fit. RCW 50.24.020. RCW 34.05.574(1), the remedy portion of the statute, does not permit a court to compromise the assessment on behalf of the Department, or to force the Department to compromise an assessment. Such a directive would also contradict the plain language of RCW 50.24.020 and the Employment Security Act's overall statement of intent. *See* RCW 50.04.010. Because the Superior Court correctly interpreted this statute, it properly affirmed the Commissioner's Decision and denied reconsideration.[10]

2. Case law cited by Affordable in support of its waiver argument is not applicable.

Appellant claims the case at bar is comparable to *Delagrave*. Br. App. at 19-21 (citing *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 111 P.3d 879 (2005)). However, in *Delagrave*, the court did not exercise any broad grant of authority to overturn agency action upon its own determination that equity required such a result. In *Delagrave*, as required

[10] The Commissioner's affirmation of the ALJ's order reflects that the Commissioner exercised discretion to not compromise the assessment. But even if the Court were to find that the Commissioner did not exercise discretion as required by law, the remedy under RCW 34.05.574 is for the Court to remand to the Commissioner for consideration whether to waive the contributions, penalties, or interest, or any portion thereof. On remand, the Commissioner would retain authority to not waive the assessment. *See* RCW 50.24.020. Reversal of the assessment is not supported by law.

by RCW 34.05.570, the court first held the factual findings were not supported by substantial evidence. *Delagrave*, 127 Wn. App. at 608. Only after reaching that conclusion did the court determine the appropriate remedy under RCW 34.05.574 was to remand. *Id.* at 612.

The *Delagrave* decision was based in part on the Department's regulation interpreting the Commissioner's waiver authority under RCW 50.20.190(2), which applies to overpayment assessments issued to unemployment benefit claimants, not to tax assessments to employers as here. *Delagrave*, 127 Wn. App. at 606-09. The regulation, which also is not applicable here, required waiver in cases where the assessment would "deprive an individual of income required for necessary living expenses." Former WAC 192-28-115.[11] Affordable has cited no regulation or statute that *requires* waiver of any contributions, penalties, or interest assessed here. None exists.[12]

In addition, *Delagrave* is distinct from the case at bar, because here Affordable does not challenge the factual findings (*see* Br. App. at 1) and

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[11] The regulation has since been amended and recodified as WAC 192-220-030 (defining against equity and good conscience to generally include when repayment of the overpayment to the benefit claimant would deprive the claimant of income required to provide for basic necessities).

[12] In addition, under WAC 192-330-120, compromise (termed a "negotiated settlement") of contributions, interest, or penalties "will be considered" when requiring repayment of the full amount would be against equity and good conscience as defined in WAC 192-100-015. This does not require the Department to enter into a settlement or compromise sums assessed to an employer.

the findings are supported by substantial evidence. *See* AR at 69-72, (ALJ FF and CL. The result in *Delagrave* is not appropriate here.

For the reasons discussed above, the Commissioner's Decision to not waive the sums assessed is without error of law and should be affirmed.

D. Attorney Fees and Costs are Not Appropriate

Affordable is not entitled to attorney fees or costs for two reasons. First, for the reasons discussed above, the Court should affirm the Commissioner's decision and find Affordable is not the "prevailing party." RCW 4.84.350(1). Second, even if Affordable prevails, the agency action was "substantially justified" because the Commissioner's reasoning "would satisfy a reasonable person" and has "a reasonable basis in law and in fact." RCW 4.84.350(1) ("substantially justified"); *Silverstreak, Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d 868, 892, 154 P.3d 891 (2007) (internal quotations omitted) ("reasonable person"); *Raven v. Dep't of Social & Health Svcs.*, 177 Wn.2d 804, 382, 306 P.3d 920 (2013) (internal citations omitted) ("reasonable basis"). To be "substantially justified," agency action "need not be correct, only reasonable." *Raven*, 177 Wn.2d at 382 (citing *Pierce v. Underwood*, 487 U.S. 552, 566, n. 2, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988)). The Commissioner's Decision meets this

standard. Award of fees is thus inappropriate, even if Affordable prevails here, which it should not.

VI. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court:

1. AFFIRM the Commissioner's Decision in its entirety;
2. AFFIRM the Pierce County Superior Court's denial of reconsideration; and
3. DENY Affordable's request for attorney fees and costs.

RESPECTFULLY SUBMITTED this 10th day of October, 2014.

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PROOF OF SERVICE

I, Rachel Gibbons, certify that I caused a copy of this document – **Respondent's Brief** – to be served on all parties or their counsel of record on the date below by Electronic Mail and US Mail Postage Prepaid via Consolidated Mail Service as indicated:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of October, 2014, at Olympia, WA.

RACHEL GIBBONS, Legal Assistant

ATTACHMENT A

2007

SESSION LAWS

OF THE

STATE OF WASHINGTON

REGULAR SESSION
SIXTIETH LEGISLATURE
Convened January 8, 2007. Adjourned April 22, 2007.

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K. KYLE THIESSEN
Code Reviser

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CHAPTER 146

[Engrossed Substitute Senate Bill 5373]

UNEMPLOYMENT INSURANCE—CORPORATE OFFICERS

AN ACT Relating to reporting, penalty, and corporate officer provisions of the unemployment insurance system; amending RCW 50.12.070, 50.29.021, 50.12.220, 50.04.165, 50.04.310, 50.24.160, 50.20.070, 50.04.245, 50.24.170, 50.04.080, and 50.04.090; adding new sections to chapter 50.04 RCW; adding new sections to chapter 50.12 RCW; adding a new section to chapter 50.29 RCW; adding new sections to chapter 50.24 RCW; creating new sections; prescribing penalties; and providing effective dates.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 50.12.070 and 1997 c 54 s 2 are each amended to read as follows:

(1)(a) Each employing unit shall keep true and accurate work records, containing such information as the commissioner may prescribe. Such records shall be open to inspection and be subject to being copied by the commissioner or his or her authorized representatives at any reasonable time and as often as may be necessary. The commissioner may require from any employing unit any sworn or unsworn reports with respect to persons employed by it, which he or she deems necessary for the effective administration of this title.

(b) An employer who contracts with another person or entity for work subject to chapter 18.27 or 19.28 RCW shall obtain and preserve a record of the unified business identifier account number for the person or entity performing the work. Failure to obtain or maintain the record is subject to RCW 39.06.010 and to a penalty determined by the commissioner, but not to exceed two hundred fifty dollars, to be collected as provided in RCW 50.24.120.

(2)(a) Each employer shall register with the department and obtain an employment security account number. Registration must include the names and social security numbers of the owners, partners, members, or corporate officers of the business, as well as their mailing addresses and telephone numbers and other information the commissioner may by rule prescribe. Registration of corporations must also include the percentage of stock ownership for each corporate officer, delineated by zero percent, less than ten percent, or ten percent or more. Any changes in the owners, partners, members, or corporate officers of the business, and changes in percentage of ownership of the outstanding shares of stock of the corporation, must be reported to the department at intervals prescribed by the commissioner under (b) of this subsection.

(b) Each employer shall make periodic reports at such intervals as the commissioner may by regulation prescribe, setting forth the remuneration paid for employment to workers in its employ, the full names and social security numbers of all such workers, and ((~~until April 1, 1978, the number of weeks for which the worker earned the "qualifying weekly wage", and beginning July 1, 1977,~~)) the total hours worked by each worker and such other information as the commissioner may by regulation prescribe.

(((~~(b)~~))) (c) If the employing unit fails or has failed to report the number of hours in a reporting period for which a worker worked, such number will be computed by the commissioner and given the same force and effect as if it had been reported by the employing unit. In computing the number of such hours worked, the total wages for the reporting period, as reported by the employing unit, shall be divided by the dollar amount of the state's minimum wage in effect for such reporting period and the quotient, disregarding any remainder, shall be credited to the worker: PROVIDED, That although the computation so made will not be subject to appeal by the employing unit, monetary entitlement may be redetermined upon request if the department is provided with credible evidence of the actual hours worked. Benefits paid using computed hours are not considered an overpayment and are not subject to collections when the correction of computed hours results in an invalid or reduced claim; however:

(i) A contribution paying employer who fails to report the number of hours worked will have its experience rating account charged for all benefits paid that are based on hours computed under this subsection; and

(ii) An employer who reimburses the trust fund for benefits paid to workers and fails to report the number of hours worked shall reimburse the trust fund for all benefits paid that are based on hours computed under this subsection.

Sec. 2. RCW 50.29.021 and 2006 c 13 s 6 are each amended to read as follows:

(1) This section applies to benefits charged to the experience rating accounts of employers for claims that have an effective date on or after January 4, 2004.

(2)(a) An experience rating account shall be established and maintained for each employer, except employers as described in RCW 50.44.010 ((~~and~~)), 50.44.030, and 50.50.030 who have properly elected to make payments in lieu of contributions, taxable local government employers as described in RCW 50.44.035, and those employers who are required to make payments in lieu of contributions, based on existing records of the employment security department.

(b) Benefits paid to an eligible individual shall be charged to the experience rating accounts of each of such individual's employers during the individual's base year in the same ratio that the wages paid by each employer to the individual during the base year bear to the wages paid by all employers to that individual during that base year, except as otherwise provided in this section.

(c) When the eligible individual's separating employer is a covered contribution paying base year employer, benefits paid to the eligible individual shall be charged to the experience rating account of only the individual's separating employer if the individual qualifies for benefits under:

(i) RCW 50.20.050(2)(b)(i), as applicable, and became unemployed after having worked and earned wages in the bona fide work; or

(ii) RCW 50.20.050(2)(b) (v) through (x).

(3) The legislature finds that certain benefit payments, in whole or in part, should not be charged to the experience rating accounts of employers except those employers described in RCW 50.44.010 ((~~and~~)), 50.44.030, and 50.50.030 who have properly elected to make payments in lieu of contributions, taxable local government employers described in RCW 50.44.035, and those employers who are required to make payments in lieu of contributions, as follows:

(a) Benefits paid to any individual later determined to be ineligible shall not be charged to the experience rating account of any contribution paying

employer. However, when a benefit claim becomes invalid due to an amendment or adjustment of a report where the employer failed to report or inaccurately reported hours worked or remuneration paid, or both, all benefits paid will be charged to the experience rating account of the contribution paying employer or employers that originally filed the incomplete or inaccurate report or reports. An employer who reimburses the trust fund for benefits paid to workers and who fails to report or inaccurately reported hours worked or remuneration paid, or both, shall reimburse the trust fund for all benefits paid that are based on the originally filed incomplete or inaccurate report or reports.

(b) Benefits paid to an individual filing under the provisions of chapter 50.06 RCW shall not be charged to the experience rating account of any contribution paying employer only if:

(i) The individual files under RCW 50.06.020(1) after receiving crime victims' compensation for a disability resulting from a nonwork-related occurrence; or

(ii) The individual files under RCW 50.06.020(2).

(c) Benefits paid which represent the state's share of benefits payable as extended benefits defined under RCW 50.22.010(6) shall not be charged to the experience rating account of any contribution paying employer.

(d) In the case of individuals who requalify for benefits under RCW 50.20.050 or 50.20.060, benefits based on wage credits earned prior to the disqualifying separation shall not be charged to the experience rating account of the contribution paying employer from whom that separation took place.

(e) Individuals who qualify for benefits under RCW 50.20.050(2)(b)(iv), as applicable, shall not have their benefits charged to the experience rating account of any contribution paying employer.

(f) With respect to claims with an effective date on or after the first Sunday following April 22, 2005, benefits paid that exceed the benefits that would have been paid if the weekly benefit amount for the claim had been determined as one percent of the total wages paid in the individual's base year shall not be charged to the experience rating account of any contribution paying employer.

(4)(a) A contribution paying base year employer, not otherwise eligible for relief of charges for benefits under this section, may receive such relief if the benefit charges result from payment to an individual who:

(i) Last left the employ of such employer voluntarily for reasons not attributable to the employer;

(ii) Was discharged for misconduct or gross misconduct connected with his or her work not a result of inability to meet the minimum job requirements;

(iii) Is unemployed as a result of closure or severe curtailment of operation at the employer's plant, building, worksite, or other facility. This closure must be for reasons directly attributable to a catastrophic occurrence such as fire, flood, or other natural disaster; or

(iv) Continues to be employed on a regularly scheduled permanent part-time basis by a base year employer and who at some time during the base year was concurrently employed and subsequently separated from at least one other base year employer. Benefit charge relief ceases when the employment relationship between the employer requesting relief and the claimant is terminated. This subsection does not apply to shared work employers under chapter 50.06 RCW.

(b) The employer requesting relief of charges under this subsection must request relief in writing within thirty days following mailing to the last known address of the notification of the valid initial determination of such claim, stating the date and reason for the separation or the circumstances of continued employment. The commissioner, upon investigation of the request, shall determine whether relief should be granted.

Sec. 3. RCW 50.12.220 and 2006 c 47 s 3 are each amended to read as follows:

(1)((~~(a)~~)) If an employer fails to file ((~~in~~)) a timely ((~~and complete manner a~~)) report as required by RCW 50.12.070, or the rules adopted pursuant thereto, the employer ((~~shall be~~)) is subject to a penalty ((~~to be determined by the commissioner, but not to exceed two hundred fifty dollars or ten percent of the quarterly contributions for each such offense, whichever is less~~)) of twenty-five dollars per violation, unless the penalty is waived by the commissioner.

((~~(b)~~)) (2) An employer who files an incomplete or incorrectly formatted tax and wage report as required by RCW 50.12.070 must receive a warning letter for the first occurrence. The warning letter will provide instructions for accurate reporting or notify the employer how to obtain technical assistance from the department. Except as provided in subsections (3) and (4) of this section, for subsequent occurrences within five years of the last occurrence, the employer is subject to a penalty as follows:

(a) When no contributions are due: For the second occurrence, the penalty is seventy-five dollars; for the third occurrence, the penalty is one hundred fifty dollars; and for the fourth occurrence and for each occurrence thereafter, the penalty is two hundred fifty dollars.

(b) When contributions are due: For the second occurrence, the penalty is ten percent of the quarterly contributions due, but not less than seventy-five dollars and not more than two hundred fifty dollars; for the third occurrence, the penalty is ten percent of the quarterly contributions due, but not less than one hundred fifty dollars and not more than two hundred fifty dollars; and for the fourth occurrence and each occurrence thereafter, the penalty is two hundred fifty dollars.

(3) If an employer knowingly misrepresents to the employment security department the amount of his or her payroll upon which contributions under this title are based, the employer shall be liable to the state for up to ten times the amount of the difference in contributions paid, if any, and the amount the employer should have paid and for the reasonable expenses of auditing his or her books and collecting such sums. Such liability may be enforced in the name of the department.

((~~(2)~~)) (4) If contributions are not paid on the date on which they are due and payable as prescribed by the commissioner, there shall be assessed a penalty of five percent of the amount of the contributions for the first month or part thereof of delinquency; there shall be assessed a total penalty of ten percent of the amount of the contributions for the second month or part thereof of delinquency; and there shall be assessed a total penalty of twenty percent of the amount of the contributions for the third month or part thereof of delinquency. No penalty so added shall be less than ten dollars. These penalties are in addition to the interest charges assessed under RCW 50.24.040.

((~~(3)~~)) (5) Penalties shall not accrue on contributions from an estate in the hands of a receiver, executor, administrator, trustee in bankruptcy, common law assignee, or other liquidating officer subsequent to the date when such receiver, executor, administrator, trustee in bankruptcy, common law assignee, or other liquidating officer qualifies as such, but contributions accruing with respect to employment of persons by a receiver, executor, administrator, trustee in bankruptcy, common law assignee, or other liquidating officer shall become due and shall be subject to penalties in the same manner as contributions due from other employers.

((~~(4)~~)) (6) Where adequate information has been furnished to the department and the department has failed to act or has advised the employer of no liability or inability to decide the issue, penalties shall be waived by the commissioner. Penalties may also be waived for good cause if the commissioner determines that the failure to ((~~timely~~)) file timely, complete, and correctly formatted reports or pay timely contributions was not due to the employer's fault.

((~~(5)~~)) (7) Any decision to assess a penalty as provided by this section shall be made by the chief administrative officer of the tax branch or his or her designee.

((~~(6)~~)) (8) Nothing in this section shall be construed to deny an employer the right to appeal the assessment of any penalty. Such appeal shall be made in the manner provided in RCW 50.32.030.

Sec. 4. RCW 50.04.165 and 1993 c 290 s 2 are each amended to read as follows:

(1)(a) Services performed by a person appointed as an officer of a corporation under RCW 23B.08.400((~~, other than those covered by chapter 50.44 RCW, shall not be~~)) are considered services in employment. However, a corporation, other than those covered by chapters 50.44 and 50.50 RCW, may elect to ((~~cover not less than all of its corporate officers under RCW 50.24.160. If an employer does not elect to cover its corporate officers under RCW 50.24.160, the employer must notify its corporate officers in writing that they are ineligible for unemployment benefits. If the employer fails to notify any corporate officer, then that person shall not be considered to be a corporate officer for the purposes of this section.~~)) exempt from coverage under this title as provided in subsection (2) of this section, any bona fide officer of a public company as defined in RCW 23B.01.400 who:

(i) Is voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation;

(ii) Is a shareholder of the corporation;

(iii) Exercises substantial control in the daily management of the corporation; and

(iv) Whose primary responsibilities do not include the performance of manual labor.

(b) A corporation, other than those covered by chapters 50.44 and 50.50 RCW, that is not a public company as defined in RCW 23B.01.400 may exempt from coverage under this title as provided in subsection (2) of this section:

(i) Eight or fewer bona fide officers who: Voluntarily agree to be exempted from coverage; are voluntarily elected or voluntarily appointed in accordance with the articles of incorporation or bylaws of the corporation; and who exercise substantial control in the daily management of the corporation, from coverage

under this title without regard to the officers' performance of manual labor if the exempted officer is a shareholder of the corporation; and

(ii) Any number of officers if all the exempted officers are related by blood within the third degree or marriage.

(c) Determinations with respect to the status of persons performing services for a corporation must be made, in part, by reference to Title 23B RCW and to compliance by the corporation with its own articles of incorporation and bylaws. For the purpose of determining coverage under this title, substance controls over form, and mandatory coverage under this title extends to all workers of this state, regardless of honorary titles conferred upon those actually serving as workers.

(2)(a) The corporation must notify the department when it elects to exempt one or more corporate officers from coverage. The notice must be in a format prescribed by the department and signed by the officer or officers being exempted and by another corporate officer verifying the decision to be exempt from coverage.

(b) The election to exempt one or more corporate officers from coverage under this title may be made when the corporation registers as required under RCW 50.12.070. The corporation may also elect exemption at any time following registration; however, an exemption will be effective only as of the first day of a calendar year. A written notice from the corporation must be sent to the department by January 15th following the end of the last calendar year of coverage. Exemption from coverage will not be retroactive, and the corporation is not eligible for a refund or credit for contributions paid for corporate officers for periods before the effective date of the exemption.

(3) A corporation may elect to reinstate coverage for one or more officers previously exempted under this section, subject to the following:

(a) Coverage may be reinstated only at set intervals of five years beginning with the calendar year that begins five years after the effective date of this section.

(b) Coverage may only be reinstated effective the first day of the calendar year. A written notice from the corporation must be sent to the department by January 15th following the end of the last calendar year the exemption from coverage will apply.

(c) Coverage will not be reinstated if the corporation: Has committed fraud related to the payment of contributions within the previous five years; is delinquent in the payment of contributions; or is assigned the array calculation factor rate for nonqualified employers because of a failure to pay contributions when due as provided in RCW 50.29.025, or for related reasons as determined by the commissioner.

(d) Coverage will not be reinstated retroactively.

(4) Except for corporations covered by chapters 50.44 and 50.50 RCW, personal services performed by bona fide corporate officers for corporations described under RCW 50.04.080(3) and 50.04.090(2) are not considered services in employment, unless the corporation registers with the department as required in RCW 50.12.070 and elects to provide coverage for its corporate officers under RCW 50.24.160.

Sec. 5. RCW 50.04.310 and 1984 c 134 s 1 are each amended to read as follows:

(1) An individual ((~~shall be deemed to be~~)) is "unemployed" in any week during which the individual performs no services and with respect to which no remuneration is payable to the individual, or in any week of less than full time work, if the remuneration payable to the individual with respect to such week is less than one and one-third times the individual's weekly benefit amount plus five dollars. The commissioner shall prescribe regulations applicable to unemployed individuals making such distinctions in the procedures as to such types of unemployment as the commissioner deems necessary.

(2) An individual ((~~shall be deemed~~)) is not ((~~to be~~)) "unemployed" during any week which falls totally within a period during which the individual, pursuant to a collective bargaining agreement or individual employment contract, is employed full time in accordance with a definition of full time contained in the agreement or contract, and for which compensation for full time work is payable. This subsection may not be applied retroactively to an individual who had no guarantee of work at the start of such period and subsequently is provided additional work by the employer.

(3) An officer of a corporation who owns ten percent or more of the outstanding stock of the corporation, or a corporate officer who is a family member of an officer who owns ten percent or more of the outstanding stock of the corporation, whose claim for benefits is based on any wages with that corporation, is:

(a) Not "unemployed" in any week during the individual's term of office or ownership in the corporation, even if wages are not being paid;

(b) "Unemployed" in any week upon dissolution of the corporation or if the officer permanently resigns or is permanently removed from their appointment and responsibilities with that corporation in accordance with its articles of incorporation or bylaws.

As used in this section, "family member" means persons who are members of a family by blood or marriage as parents, stepparents, grandparents, spouses, children, brothers, sisters, stepchildren, adopted children, or grandchildren.

Sec. 6. RCW 50.24.160 and 1977 ex.s. c 292 s 12 are each amended to read as follows:

Except as provided in RCW 50.04.165, any employing unit ((~~for which services that do not constitute employment as defined in this title are performed may file with the commissioner a written election that all such services performed by any distinct class or group of individuals or by all individuals in its employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of this title for not less than two calendar years. Upon the written approval of such election by the commissioner, such services shall be deemed to constitute employment subject to this title from and after the date stated in such approval. Services covered pursuant to this section shall cease to be deemed employment subject hereto as of January 1st of any calendar year subsequent to such two calendar years, only if the employing unit files with the commissioner prior to the fifteenth day of January of such year a written application for termination of coverage~~)) for which services that do not constitute employment as defined in this title are performed may file with the commissioner a written election that all such services performed by any distinct class or group of individuals or by all individuals in its employment in one or more distinct establishments or places of

business shall be deemed to constitute employment for all the purposes of this title for at least two calendar years. Upon the written approval of such election by the commissioner, such services shall be deemed to constitute employment subject to this title on and after the date stated in the approval. Services covered under this section shall cease to be deemed employment as of January 1st of any calendar year subsequent to the two-calendar year period, only if the employing unit files with the commissioner before January 15th of that year a written application for termination of coverage.

Sec. 7. RCW 50.20.070 and 1973 1st ex.s. c 158 s 5 are each amended to read as follows:

((~~Irrespective of any other provisions of this title~~)) (1) With respect to determinations delivered or mailed before January 1, 2008, an individual ((~~shall be~~)) is disqualified for benefits for any week ((~~with respect to which~~)) he or she has knowingly made a false statement or representation involving a material fact or knowingly failed to report a material fact and ((~~has thereby~~)), as a result, has obtained or attempted to obtain any benefits under the provisions of this title, and for an additional twenty-six weeks ((~~commencing~~)) beginning with the first week for which he or she completes an otherwise compensable claim for waiting period credit or benefits following the date of the delivery or mailing of the determination of disqualification under this section((~~: PROVIDED, That~~)). However, such disqualification shall not be applied after two years have elapsed from the date of the delivery or mailing of the determination of disqualification under this section((~~, but~~)).

(2) With respect to determinations delivered or mailed on or after January 1, 2008:

(a) An individual is disqualified for benefits for any week he or she has knowingly made a false statement or representation involving a material fact or knowingly failed to report a material fact and, as a result, has obtained or attempted to obtain any benefits under the provisions of this title;

(b) An individual disqualified for benefits under this subsection for the first time is also disqualified for an additional twenty-six weeks beginning with the Sunday of the week in which the determination is mailed or delivered;

(c) An individual disqualified for benefits under this subsection for the second time is also disqualified for an additional fifty-two weeks beginning with the Sunday of the week in which the determination is mailed or delivered, and is subject to an additional penalty of twenty-five percent of the amount of benefits overpaid or deemed overpaid;

(d) An individual disqualified for benefits under this subsection a third time and any time thereafter is also disqualified for an additional one hundred four weeks beginning with the Sunday of the week in which the determination is mailed or delivered, and is subject to an additional penalty of fifty percent of the amount of benefits overpaid or deemed overpaid.

(3) All penalties collected under this section must be expended for the proper administration of this title as authorized under RCW 50.16.010 and for no other purposes.

(4) All overpayments and penalties established by such determination of disqualification ((~~shall~~)) must be collected as otherwise provided by this title.

NEW SECTION. **Sec. 8.** A new section is added to chapter 50.04 RCW to read as follows:

For the purposes of this title:

(1) "Professional employer organization" means a person or entity that enters into an agreement with one or more client employers to provide professional employer services. "Professional employer organization" includes entities that use the term "staff leasing company," "permanent leasing company," "registered staff leasing company," "employee leasing company," "administrative employer," or any other name, when they provide professional employer services to client employers. The following are not classified as professional employer organizations: Independent contractors in RCW 50.04.140; temporary staffing services companies and services referral agencies as defined in RCW 50.04.245; third-party payers as defined in section 15 of this act; or labor organizations.

(2) "Client employer" means any employer who enters into a professional employer agreement with a professional employer organization.

(3) "Coemployer" means either a professional employer organization or a client employer that has entered into a professional employer agreement.

(4) "Covered employee" means an individual performing services for a client employer that constitutes employment under this title.

(5) "Professional employer services" means services provided by the professional employer organization to the client employer, which include, but are not limited to, human resource functions, risk management, or payroll administration services, in a coemployment relationship.

(6) "Coemployment relationship" means a relationship that is intended to be ongoing rather than temporary or project-specific, where the rights, duties, and obligations of an employer in an employment relationship are allocated between coemployers pursuant to a professional employer agreement and state law. A coemployment relationship exists only if a majority of the employees performing services to a client employer, or to a division or work unit of a client employer, are covered employees. In determining the allocation of rights and obligations in a coemployment relationship:

(a) The professional employer organization has only those employer rights and is subject only to those obligations specifically allocated to it by the professional employer agreement or state law;

(b) The client employer has those rights and obligations allocated to it by the professional employer agreement or state law, as well as any other right or obligation of an employer that is not specifically allocated by the professional employer agreement or state law.

(7) "Professional employer agreement" means a written contract between a client employer and a professional employer organization that provides for: (a) The coemployment of covered employees; and (b) the allocation of employer rights and obligations between the client and the professional employer organization with respect to the covered employees.

NEW SECTION. **Sec. 9.** A new section is added to chapter 50.12 RCW to read as follows:

(1) A professional employer organization must register with the department and ensure that its client employers are registered with the department as provided in RCW 50.12.070.

(2) By September 1, 2007, the professional employer organization shall provide the department with:

(a) The names, addresses, unified business identifier numbers, and employment security account numbers of all its existing client employers who do business or have covered employees in Washington state. This requirement applies whether or not the client employer currently has covered employees performing services in Washington state;

(b) The names and social security numbers of corporate officers, owners, or limited liability company members of client employers; and

(c) The business location in Washington state where payroll records of its client employers will be made available for review or inspection upon request of the department.

(3) For client employers registering for the first time as required in RCW 50.12.070, the professional employer organization must:

(a) Provide the names, addresses, unified business identifier numbers, and employment security account numbers of the client employers who do business or have covered employees in Washington state. This requirement applies whether or not the client employer currently has covered employees performing services in Washington state;

(b) Provide the names and social security numbers of corporate officers, owners, or limited liability company members of the client employers; and

(c) Provide the business location in Washington state where payroll records of its client employers will be made available for review or inspection at the time of registration or upon request of the department.

(4) The professional employer organization must notify the department within thirty days each time it adds or terminates a relationship with a client employer. Notification must take place on forms provided by the department. The notification must include the name, employment security account number, unified business identifier number, and address of the client employer, as well as the effective date the relationship began or terminated.

(5) The professional employer organization must provide a power of attorney, confidential information authorization, or other evidence, completed by each client employer as required by the department, authorizing it to act on behalf of the client employer for unemployment insurance purposes.

(6) The professional employer organization must file quarterly wage and contribution reports with the department. The professional employer organization may file either a single electronic report containing separate and distinct information for each client employer and using the employer account number and tax rate assigned to each client employer by the department, or separate paper reports for each client employer.

(7) The professional employer organization must maintain accurate payroll records for each client employer and make these records available for review or inspection upon request of the department at the location provided by the professional employer organization.

NEW SECTION. **Sec. 10.** A new section is added to chapter 50.29 RCW to read as follows:

For purposes of this title, each client employer of a professional employer organization is assigned its individual contribution rate based on its own experience.

NEW SECTION. **Sec. 11.** A new section is added to chapter 50.24 RCW to read as follows:

(1) The client employer of a professional employer organization is liable for the payment of any taxes, interest, or penalties due.

(2) The professional employer organization may collect and pay taxes due to the department for unemployment insurance coverage from its client employers in accordance with its professional employer agreement. If such payments have been made to the professional employer organization by the client employer, the department shall first attempt to collect the contributions due from the professional employer organization.

(3) To collect any contributions, penalties, or interest due to the department from the professional employer organization, the department must follow the procedures contained in chapter 50.24 RCW. If the amount of contributions, interest, or penalties assessed by the commissioner pursuant to chapter 50.24 RCW is not paid by the professional employer organization within ten days, then the commissioner may follow the collection procedures in chapter 50.24 RCW. After the ten-day period, if the professional employer organization has not paid the total amount owing, the commissioner may also pursue the client employer to collect what is owed using the procedures contained in chapter 50.24 RCW.

NEW SECTION. **Sec. 12.** A new section is added to chapter 50.12 RCW to read as follows:

A professional employer organization's authority to act as a coemployer for purposes of this title may be revoked by the department when it determines that the professional employer organization has substantially failed to comply with the requirements of section 9 of this act.

NEW SECTION. **Sec. 13.** The department shall report on the implementation of sections 8 through 12 of this act and its impacts on professional employer organizations, small businesses, and the integrity and operations of the unemployment insurance system operated under Title 50 RCW. The department shall report to the unemployment insurance advisory committee and to the appropriate committees of the legislature no later than December 1, 2010.

Sec. 14. RCW 50.04.245 and 1995 c 120 s 1 are each amended to read as follows:

(1) Subject to the other provisions of this title, personal services performed for, or for the benefit of, a third party pursuant to a contract with a temporary staffing services ((~~agency, employee leasing agency,~~)) company or services referral agency((~~, or other entity shall be deemed to be~~)) constitutes employment for the temporary staffing services ((~~agency, employee leasing agency,~~)) company or services referral agency((~~, or other entity~~)) when the agency is responsible, under contract or in fact, for the payment of wages in remuneration for the services performed.

(2) The temporary staffing services company or services referral agency is considered the employer as defined in RCW 50.04.080.

(3) For the purposes of this section:

(a) "Temporary staffing services ((~~agency~~)) company" means an individual or entity ((~~that is engaged in the business of furnishing individuals to perform services on a part-time or temporary basis for a third party~~)) that engages in:

Recruiting and hiring its own employees; finding other organizations that need the services of those employees; and assigning those employees on a temporary basis to perform work at or services for a client to support or supplement the client's work forces, or to provide assistance in special work situations, such as employee absences, skill shortages, and seasonal workloads, or to perform special assignments or projects, all under the direction and supervision of the client. "Temporary staffing services company" does not include professional employer organizations as defined in section 8 of this act, permanent employee leasing, or permanent employee placement services.

(b) ((~~"Employee leasing agency" means an individual or entity that for a fee places the employees of a client onto its payroll and leases such employees back to the client.~~

~~(c)~~)) "Services referral agency" means an individual or entity other than a professional employer organization as defined in section 8 of this act that is engaged in the business of offering the services of ((~~an~~)) one or more individuals to perform specific tasks for a third party.

NEW SECTION. **Sec. 15.** A new section is added to chapter 50.04 RCW to read as follows:

(1) Subject to the other provisions of this title, personal services performed for, or for the benefit of, an employer who utilizes a third-party payer constitutes employment for the employer. The third-party payer is not considered the employer as defined in RCW 50.04.080.

(2) For purposes of this section, "third-party payer" means an individual or entity that enters into an agreement with one or more employers to provide administrative, human resource, or payroll administration services, but does not provide an employment or coemployment relationship. Temporary staffing services companies, services referral agencies, professional employer organizations, and labor organizations are not third-party payers.

NEW SECTION. **Sec. 16.** A new section is added to chapter 50.04 RCW to read as follows:

(1) For purposes of this title, "common paymaster" or "common pay agent" means an independent third party who contracts with, and represents, two or more employers, and who files a combined tax report for those employers.

(2) Common paymaster combined tax reporting is prohibited. "Common paymaster" does not meet the definition of a joint account under RCW 50.24.170.

(3) A common pay agent or common paymaster is not an employer as defined in RCW 50.04.080 or an employing unit as defined in RCW 50.04.090.

Sec. 17. RCW 50.24.170 and 1945 c 35 s 105 are each amended to read as follows:

(1) The commissioner shall prescribe regulations for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and shall, in accordance with such regulations and upon application by two or more employers to establish such account, or to merge their several individual accounts in a joint account, maintain such joint account as if it constituted a single employer's account.

(2) Joint accounts may not be established for professional employer organizations, as defined in section 8 of this act, or third-party payers, as defined in section 15 of this act, and their clients.

NEW SECTION. **Sec. 18.** A new section is added to chapter 50.24 RCW to read as follows:

(1) Upon termination, dissolution, or abandonment of a corporate or limited liability company business, any officer, member, or owner who, having control or supervision of payment of unemployment tax contributions under RCW 50.24.010 or 50.24.014: (a) Willfully evades any contributions imposed under this title; (b) willfully destroys, mutilates, or falsifies any book, document, or record; or (c) willfully fails to truthfully account for, or makes under oath, any false statement relating to the financial condition of the corporation or limited liability company business, is personally liable for any unpaid contributions and interest and penalties on those contributions. For purposes of this section, "willfully" means an intentional, conscious, and voluntary course of action.

(2) Persons liable under subsection (1) of this section are liable only for contributions that became due during the period he or she had the control, supervision, responsibility, or duty to act for the corporation or limited liability company, plus interest and penalties on those contributions.

(3) Persons liable under subsection (1) of this section are exempt from liability if all of the assets of the corporation or limited liability company have been applied to its debts through bankruptcy or receivership.

(4) Any person having been issued a notice of assessment under this section is entitled to the appeal procedures under chapter 50.32 RCW.

(5) This section applies only when the employment security department determines that there is no reasonable means of collecting the contributions owed directly from the corporation or limited liability company.

(6) This section does not relieve the corporation or limited liability company of other tax liabilities under this title or impair other tax collection remedies afforded by law.

(7) Collection authority and procedures described in this chapter apply to collections under this section.

Sec. 19. RCW 50.04.080 and 1985 c 41 s 1 are each amended to read as follows:

(1) "Employer" means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, limited liability company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or the legal representative of a deceased person, having any person in employment or, having become an employer, has not ceased to be an employer as provided in this title.

(2) For the purposes of collection remedies available under chapter 50.24 RCW, "employer," in the case of a corporation or limited liability company, includes persons found personally liable for any unpaid contributions and interest and penalties on those contributions under section 18 of this act.

(3) Except for corporations covered by chapters 50.44 and 50.50 RCW, "employer" does not include a corporation when all personal services are performed only by bona fide corporate officers, unless the corporation registers

with the department as required in RCW 50.12.070 and elects to provide coverage for its corporate officers under RCW 50.24.160.

Sec. 20. RCW 50.04.090 and 2001 1st sp.s. c 11 s 1 are each amended to read as follows:

(1) "Employing unit" means any individual or any type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1937, had in its employ or in its "employment" one or more individuals performing services within this state. The state and its political subdivisions shall be deemed employing units as to any transactions occurring on or after September 21, 1977 which would render an employing unit liable for contributions, interest, or penalties under RCW 50.24.130. "Employing unit" includes Indian tribes as defined in RCW 50.50.010.

(2) Except for corporations covered by chapters 50.44 and 50.50 RCW, "employing unit" does not include a corporation when all personal services are performed only by bona fide corporate officers, unless the corporation registers with the department as required in RCW 50.12.070 and elects to provide coverage for its corporate officers under RCW 50.24.160.

NEW SECTION. **Sec. 21.** If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state or the eligibility of employers in this state for federal unemployment tax credits, the conflicting part of this act is inoperative solely to the extent of the conflict, and the finding or determination does not affect the operation of the remainder of this act. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state or the granting of federal unemployment tax credits to employers in this state.

NEW SECTION. **Sec. 22.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 23.** Section 3 of this act applies for penalties assessed on reports and contributions due beginning October 1, 2007.

NEW SECTION. **Sec. 24.** Section 4 of this act takes effect January 1, 2009.

NEW SECTION. **Sec. 25.** Sections 5, 6, and 10 through 12 of this act take effect January 1, 2008.

Passed by the Senate March 12, 2007.

Passed by the House April 6, 2007.

Approved by the Governor April 20, 2007.

Filed in Office of Secretary of State April 20, 2007.

WASHINGTON STATE ATTORNEY GENERAL

October 10, 2014 - 1:49 PM

Transmittal Letter

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Case Name: Affordable Storage Containers, Inc. v State
Court of Appeals Case Number: 46315-6

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